No. _____

In the Supreme Court of the United States

IN RE DUANE EDWARD BUCK,

Petitioner,

ON PETITION FOR WRIT OF HABEAS CORPUS TO RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIFICATE OF SERVICE

I certify that on the 15th day of September, 2011, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, PETITION FOR A WRIT OF HABEAS CORPUS, and MOTION FOR STAY OF EXECUTION PENDING CONSIDERATION AND DISPOTIION OF PETITION FOR WRIT OF HABEAS CORPUS on Georgette Oden, Assistant Attorney General of Texas, Office of the Texas Attorney General, Post Office Box 12548, Austin, Texas 78711, via email (georgette.oden@oag.state.tx.us) and through the United States Postal Service by first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Gregory W. Wiercioch

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PETITION FOR WRIT OF HABEAS CORPUS

MR. BUCK IS SCHEDULED TO BE EXECUTED TODAY, SEPTEMBER 15, 2011, AFTER 6:00 P.M. CENTRAL TIME.

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CAPITAL CASE

QUESTIONS PRESENTED

In capital sentencing proceedings in Texas, the State has the burden to prove beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

1. Whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty.

2. Whether the government may rely on the defendant's race during the sentencing phase of a capital trial as evidence that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

3. Whether Mr. Buck's execution is arbitrary and capricious in violation of *Furman v. Georgia*, 408 US 238 (1972).

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Supreme Court Petitioner Duane Buck was the Petitioner before the United States District Court for the Southern District of Texas and the Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Buck is a prisoner sentenced to death and in the custody of Rick Thaler, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("Director"). Original habeas relief is hereby sought against the Director. Mr. Buck separately files a *certiorari* petition seeking review of the denial of Mr. Buck's Motion for Relief under FED. R. CIV. P. 60.

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In the Supreme Court of the United States

IN RE DUANE EDWARD BUCK,

Petitioner,

ON PETITION FOR WRIT OF HABEAS CORPUS

In June 2000, the Attorney General of the State of Texas announced that a handful of prosecutors in Texas had relied on the race of capital defendants to persuade jurors to impose the death penalty. To repair the integrity of the criminal justice system, Texas's then-Attorney General (now United States Senator) John Cornyn made solemn guarantees to the public that the Office of the Attorney General would take unprecedented steps to ensure that no death sentence obtained in such a constitutionally-offensive manner would ever be carried out. Texas upheld its promise in the cases of five of the six death-sentenced individuals in which the Attorney General had concluded that the government used the defendant's race as evidence of future dangerousness. Refusing to rely on procedural defenses in federal court, the Attorney General confessed constitutional error in each of those cases. And, in each of those cases, the court overturned the death sentence.

In Petitioner Duane Edward Buck's case, however, Texas broke its promise to restore the integrity of the criminal justice system. With a new Attorney General in

office by the time Mr. Buck's case reached the federal courts, Texas vigorously defended the constitutionality of Mr. Buck's death sentence. Ultimately relying on material misrepresentations and deliberate omissions, the Attorney General successfully persuaded the lower courts that the use of race-tainted future dangerousness evidence in Mr. Buck's case was distinguishable from the other cases singled out for correction by that office on federal habeas review. As a result, of the six individuals identified by Attorney General Cornyn, only Mr. Buck faces the prospect of having a death sentence carried out that was procured by the government's reliance on his race. Mr. Buck's treatment by Texas demands federal intervention in the interests of justice.

Accordingly, Mr. Buck asks that this Court grant a writ of habeas corpus and relieve him of his patently unconstitutional sentence.

OPINIONS BELOW

This is an original action. The order of the court of appeals denying a certificate of appealability ("COA") is not reported, but is attached as Appendix 1. The order of the federal district court denying Mr. Buck's Rule 59(e) motion is not reported, but is attached as Appendix 2. The order of the federal district court denying Mr. Buck's Rule 60 motion is not reported, but is attached as Appendix 3. The opinion of the Fifth Circuit denying a COA to review the district court's judgment disposing of Mr. Buck's federal habeas corpus petition is not reported, but is attached as Appendix 4. The memorandum opinion of the district court denying

Mr. Buck's federal habeas corpus petition is not reported, but is attached as Appendix 5.

JURISDICTION

The Court has jurisdiction to entertain this petition for writ of habeas corpus under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a). *See also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

Mr. Buck made application to the district court, but was unable to obtain review of the merits of his equal protection and due process claims because the court was misled by the Director into applying a procedural default. When Mr. Buck recently sought relief from the judgment under Rule 60, the district court again was misled by the Director into refusing to reopen the case. The district court denied relief before Mr. Buck had an opportunity to file a reply addressing the Director's misleading opposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 5, 2000, this Court granted *certiorari* in *Saldaño v. Texas*, No. 99–8119, vacated the judgment of the Texas Court of Criminal Appeals affirming Saldaño's death sentence, and remanded for further consideration in light of a concession by then-Attorney General of Texas John Cornyn that Saldaño's death sentence had been obtained in violation of equal protection. In *Saldaño*, the government called psychologist Walter Quijano as an expert in the sentencing phase of Saldaño's capital trial and elicited testimony about "identifying markers" that help psychologists determine whether there is a probability a defendant will present a threat of violence in the future. One of the factors that Dr. Quijano identified as increasing the likelihood of future dangerousness was the defendant's race or ethnicity. After the Texas Court of Criminal Appeals affirmed his conviction and sentence, Saldaño filed a petition for writ of *certiorari* in this Court asking the Court to decide the question of "[w]hether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty." *Saldano v. State*, No. 72,556 (Tex. Crim. App. 2002).

On behalf of the State of Texas, the Attorney General filed a response to the petition for writ of *certiorari* conceding that constitutional error had occurred. Quoting *Rose v. Mitchell*, 443 US 545, 555 (1979), the Attorney General observed

that "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."[1] The Attorney General argued that the "infusion of race as a factor for the jury to weigh in making its determination violated [Saldaño's] constitutional right to be sentenced without regard to the color of his skin."[2]

Four days after this Court granted *certiorari* in *Saldaño*, the Attorney General issued a press release in which he identified Mr. Buck's case, and five others then pending in post-conviction proceedings, as cases in which the prosecution had unconstitutionally relied on the testimony of Dr. Quijano that a defendant's race increased the likelihood of future dangerousness:

> After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial. ***Six of these eight cases are similar to that of Victor Hugo Saldano***.[3]

One of those six cases was Mr. Buck's.[4]

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[1] Response to Petition for Writ of *Certiorari* at 7, *Saldaño v. State*, No. 99-8119 (attached as Appendix 6).

[2] *Id.* at 8.

[3] News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000) (emphasis supplied) (attached as Appendix 7).

[4] News Release, Office of the Attorney General, Texas Attorney General John Cornyn offers the following information on capital cases that involved Dr. Walter Quijano's testimony using race as a factor to determine future dangerousness (June 9, 2000) (attached as Appendix 8).

The Attorney General said Texas would not contest equal protection claims in federal court in the six cases that he identified as similarly situated to Saldaño's: "[I]f the attorneys [for the six identified defendants] amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object."[5] "As I explained in a filing before the United States Supreme Court...it is inappropriate to allow race to be considered as a factor in our criminal justice system," the Attorney General wrote.[6] "[T]he United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone."[7] Although Mr. Buck's case was not then pending in federal court, the Attorney General promised that Texas would "continue to vigilantly monitor all death-penalty cases."[8] "Our goal is to assure the people of Texas that our criminal justice system is fairly administered."[9] The Attorney General acknowledged that some cases might still be in state proceedings and

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[5] James Kimberly, *Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony*, HOU. CHRON., June 10, 2000 at A1 (attached as Appendix 9).

[6] News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000) (attached as Appendix 7).

[7] *Id.*

[8] *Id.*

[9] Steve Lash, *Texas Death Case Set Aside: U.S. Supreme Court Sees Possible Racial Bias*, HOU. CHRON., June 6, 2000 at A1 (attached as Appendix 10).

guaranteed, "if and when those cases reach this office they will be handled in a similar manner as the Saldaño case."[10]

Mr. Buck's case was still in state habeas proceedings at the time of the Attorney General's statement. It was the only case identified by the Attorney General as containing constitutional error not yet in federal court.

The six cases in which the Attorney General's thorough audit discovered equal protection violations were those of Carl Blue, John Alba, Gustavo Garcia, Eugene Broxton, Michael Gonzales, and Duane Buck. In all six cases, the State relied on testimony by Quijano about race in asking the jury to find the defendant a future danger, a pre-requisite to imposing a sentence of death. In three of the cases, the prosecution called Quijano as a witness; in three others, including Mr. Buck's, the defense called Quijano and race-based testimony was elicited on cross-examination and relied upon by the prosecution to carry its burden of proving future dangerousness.

The cases of Carl Blue and John Alba were like Mr. Buck's case in that the defense, rather than the prosecution, had called Quijano to the stand. Carl Blue's habeas corpus petition was already pending in federal district court at the time the Attorney General identified his case as containing constitutional error in 2000. Mr. Blue had not raised an equal protection or due process claim in state or federal court at that time. Despite this, the Attorney General waived the exhaustion

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[10] James Kimberly, *supra*.

requirement and all procedural defenses (including the statute of limitations) and conceded that the government's reliance on race violated equal protection.[11] On September 29, 2000, the district court granted Blue a new sentencing hearing because "Quijano's testimony...where he declares that race is a predictor of future dangerousness, was clearly unconstitutional" and "[n]either the trial court nor the prosecutor sought to correct this wrong."[12]

John Alba's federal habeas petition had already been denied by the federal district court at the time the Attorney General identified his sentence as having been obtained in violation of the Equal Protection Clause. The Attorney General therefore confessed error in that case to the United States Court of Appeals for the Fifth Circuit, which vacated the district court's denial, remanded the case to the district court, and instructed it to grant the petition on the basis of the constitutional violation.[13] District Court Judge Paul Brown thereafter granted Mr. Alba a resentencing free from consideration of his race on September 25, 2000.[14]

In the cases of Gustavo Garcia, Eugene Broxton, and Michael Gonzales, the government, rather than the defense, called Quijano to the stand. All three cases

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[11] Memorandum Opinion and Order at 17, *Blue v. Johnson*, No. 4:99-cv-00350, slip op. at 16 (S.D. Tex. Sep. 29, 2000) (attached as Appendix 11).

[12] *Id*.

[13] *Alba v. Johnson*, No. 00-40194 (5th Cir. Aug. 21, 2000) (unpublished) (attached as Appendix 12).

[14] Order, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000) (attached as Appendix 13).

were pending in federal district court when the Attorney General identified them as warranting new sentencing hearings. At the time, none had raised a claim alleging equal protection or due process violations in state or federal court related to the prosecution's reliance on race as a factor increasing the likelihood of future dangerousness. As in *Blue*, the Attorney General permitted all three to file "supplemental" habeas corpus petitions, waived all procedural defenses, and conceded constitutional error. All three were granted relief by the district court between 2000 and 2002.[15]

In 2002, while Mr. Buck's initial state habeas application was pending, his state habeas counsel, Robin Norris, filed a subsequent application raising equal protection and due process claims based on the government's reliance on Mr. Buck's race as an aggravating factor during the capital sentencing proceeding. On October 15, 2003, the Court of Criminal Appeals denied the initial application and dismissed the subsequent application raising Mr. Buck's equal protection and due process claims as an abuse of the writ. Order, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003) (unpublished).

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[15] *See* Order, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sep. 7, 2000) (attached as Appendix 14); Order at 10-11, *Broxton v. Johnson*, No. 4:00-cv-01034 (S.D. Tex. Mar. 28, 2001) (attached as Appendix 15); Order Granting Respondent's Partial Summary Judgment and Recognizing Respondent's Notice of Error Allowing Petitioner a New Sentencing Hearing to Determine if a Life or Death Sentence Should Be Imposed in This Case, *Gonzales v. Johnson*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002) (attached as Appendix 16).

Mr. Buck, represented by different counsel, filed his federal habeas corpus petition on October 14, 2004. When Mr. Buck raised his equal protection and due process claims in federal court, instead of waiving procedural defenses—as the Office of the Attorney General previously promised Mr. Buck it would—the Attorney General inexplicably raised them. Moreover, instead of formally conceding error to the tribunal as promised, the Attorney General not only failed to disclose the prior admissions about Mr. Buck's case, but also misled the Court about the nature of the cases in which his office had already confessed—and in which federal courts had already found—equal protection and due process violations:

> Buck claims that his constitutional rights to due process and equal protection were violated by the punishment phase testimony of his own expert. Specifically, he complains that defense expert, Dr. Quijano, testified that African-American offenders are statistically more likely to be a continuing threat to society than other racially distinct groups. ... However, Buck has procedurally defaulted these claims by failing to properly present them to the state courts….This Court is no doubt aware that the Director waived similar procedural bars and confessed error in other cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano (collectively referred to as "the *Saldano* cases"). *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 639-40 (especially n.3) (E.D. Tex. 2003). ***This case, however, presents a strikingly different scenario than that presented in Saldano–Buck himself, not the State offered Dr. Quijano's testimony into evidence. Based on this critical distinction***, the Director deems himself compelled to assert the valid procedural bar precluding merits review of Buck's constitutional claims. And on this basis, federal habeas relief should be denied.

Respondent Dretke's Answer and Motion for Summary Judgment with Brief in Support at 17 (Docket Entry No. 7) (emphasis supplied). Thus, the Attorney

General conditioned his assertion of a procedural bar on the purported distinction that the defense, instead of the prosecution, had called Quijano.

The Attorney General expanded upon its purported reasons for asserting a procedural defense in the case:

> ***[T]he Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano***. *Saldano*, 267 F. Supp. 2d at 639, n. 3. However, this case is not *Saldano*. In Saldano's case Dr. Quijano testified for the State. *Id*. at 638. Thus, it was the State that introduced evidence that Hispanics were more likely to be a continuing threat to society and urged the jury to consider evidence of Saldano's race and ethnicity in making a determination of future dangerousness. *Id*. This obvious violation of Saldano's equal protection rights was repugnant to the administration of justice.…***[B]ecause it was Buck who called Dr. Quijano to testify*** and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors, this case does not represent the odious error contained in the *Saldano* cases. As such, the former actions of the Director are not applicable and should not be considered in deciding this case.

Id. at 20 (emphases supplied).

Although the Attorney General, in his own words, was "obviously aware" of the prior confessions of error in the other federal habeas corpus cases involving Quijano's testimony, he did not discuss the circumstances of those cases. Specifically, the Attorney General did not disclose to the district court: (1) that his office had previously identified Mr. Buck's case after a "thorough audit" as one that was ***similar*** to Saldaño's case while simultaneously identifying other cases as ***dissimilar*** to Saldaño's, *i.e.*, that the Attorney General had made a prior admission material to his present litigation position before the Court; (2) that the Attorney

General had "waived similar procedural bars and confessed error" in cases in which the ***defense*** sponsored Quijano's testimony and in which federal courts had found constitutional violations and granted relief; and (3) that the Attorney General had previously promised that his office would treat Mr. Buck's case the same as the other cases he had identified once Mr. Buck's case reached federal court.

On July 24, 2006, the district court applied a procedural default in reliance on the Attorney General's false representations that Mr. Buck's case was different from other cases in which the Attorney General had waived defenses and confessed error because Mr. Buck had called Quijano as a witness. Memorandum and Order at 15-17, *Buck v. Dretke*, No. 4:04-cv-03965 (S.D. Tex. July 24, 2006). The court also denied a certificate of appealability ("COA"). *Id*. at 25.

On November 22, 2006, Mr. Buck filed an application for COA in the court of appeals. In his response, the Attorney General argued that the "conclusion that Buck's claims were procedurally defaulted [was] not debatable among jurists of reason." Respondent-Appellee's Opposition to Application for Certificate of Appealability at 11, *Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir. Dec. 18, 2006). The Attorney General again misleadingly distinguished Mr. Buck's case from the other cases in which the Attorney General had waived procedural defenses and confessed constitutional violations:

> This Court is no doubt aware that the Director waived similar procedural bars and confessed error in other cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano (collectively referred to as "the *Saldano* cases"). *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 63 9-40 (especially n.3) (E.D. Tex. 2003).

> Based on these concessions, Buck argues that the court below erred in ignoring federal intra-court comity in finding his claims to be procedurally barred. Application, at 6-13....Buck's cited cases certainly do not stand for this proposition because the petitioners are not "similarly situated" as he asserts. Application, at 6. ***Rather, this case presents a strikingly different scenario than that presented in Saldano because Buck himself—not the State—offered Dr. Quijano's testimony into evidence.*** Based on this ***critical distinction***, the Director deemed himself compelled to assert the valid procedural bar precluding merits review of Buck's constitutional claims in the court below.
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> ****
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> First, the Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano. *Saldano*, 267 F. Supp . 2d at 639, n.3. This case, however, is not *Saldano* or *Broxton*. *Broxton v. Johnson*, H-00-CV-1034, 2001 LEXIS 25715 (March 28, 2001); Application, at 7. ***In both of those cases where the Director conceded error, Dr. Quijano testified for the State***, e.g. *Saldano*, 267 F. Supp. 2d at 638; Application at 7 (noting that in *Broxton*, Dr. Quijano testified for the State). Thus, it was the State that introduced evidence that Hispanics (or African-Americans) were more likely to be a continuing threat to society and urged the jury to consider evidence of race and ethnicity in making a determination of future dangerousness. *Id*. This obvious violation of a petitioner's equal protection rights was repugnant to the administration of justice.
>
> Yet ... ***because it was Buck who called Dr. Quijano to testify and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors***, this case does not represent the odious error contained in the *Saldano* cases. As such, the former actions of the Director are not applicable and should not be considered in deciding this case.

Id. at 16-18 (emphases in original and supplied).

The Attorney General did not disclose to the appellate court: (1) that the Attorney General had made a previous admission that after a "thorough audit" he had identified Mr. Buck's case as being similar to *Saldaño*; (2) that the Attorney

General had promised that his office would waive procedural defenses in Mr. Buck's case once the case reached federal court; and (3) that in two previous cases in which the ***defense*** had sponsored Quijano's testimony and "derived the benefit of Dr. Quijano's overall opinion" (*Blue* and *Alba*), the Attorney General had waived procedural defenses and formally confessed constitutional error due to the State's use of the defendant's race to support a death sentence. The Attorney General's response failed to mention or cite to the cases of *Blue* or *Alba* at all.

Mr. Buck's COA application thereafter remained pending for three years until the court of appeals, on September 25, 2009, denied COA. In reliance on the Attorney General's representations that Mr. Buck's case was different from others in which the Attorney General had conceded error and in which federal courts had granted relief, the Fifth Circuit held that reasonable jurists could not disagree about the merits of Mr. Buck's constitutional claims and denied a COA. *Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir. 2009). Mr. Buck thereafter sought *certiorari*, which was denied on April 19, 2010. *Buck v. Thaler*, No. 09-8589 (U.S. 2009).

On April 25, 2011, the trial court entered an order setting Mr. Buck's execution date for September 15, 2011. The following day, appointed federal habeas counsel indicated that he would like the assistance of the Texas Defender Service ("TDS") in preparing a clemency petition on behalf of Mr. Buck. Attorneys from TDS agreed to represent Mr. Buck *pro bono* in clemency proceedings.

In June 2011, the *pro bono* TDS attorneys began collecting records and reviewing the record in order to prepare for clemency proceedings. As part of that

preparation, the defense team conducted extensive review of the media coverage of Mr. Buck's case. As a result, the June 2000 statements of then-Attorney General John Cornyn, identifying Mr. Buck's case as containing constitutional error were discovered. In July 2011, *pro bono* TDS counsel reviewed the records of the other five cases identified by then-Attorney General John Cornyn as containing similar constitutional error. The defense team reviewed the cases of *Blue* and *Alba* and discovered that the Attorney General had misrepresented, throughout the federal proceedings, that Mr. Buck's case differed from the others because he called Dr. Quijano to the stand. On August 31, 2011, counsel from TDS filed a clemency petition with the Texas Board of Pardons and Paroles, including a detailed description of the State's reliance on race as a factor increasing the likelihood of future dangerousness during Mr. Buck's capital sentencing hearing.

On September 7, 2011, now represented by *pro bono* TDS counsel in federal court, Mr. Buck filed a motion in the district court requesting that it grant him relief from the judgment due to the extraordinary circumstances that: (1) the Attorney General of Texas had already identified Mr. Buck's death sentence as one obtained in violation of equal protection based on the government's reliance on race as a factor at sentencing; (2) the Attorney General had promised that he would not assert procedural defenses against Mr. Buck's claims related to the government's violations of fundamental constitutional norms; and (3) the Attorney General's pleadings had failed to disclose these relevant facts and the circumstances of other

cases in which the Office of the Attorney General had previously waived procedural defenses and confessed error.

The Attorney General filed the Director's Response on September 9, 2011. The Response argued that a material distinction existed between Mr. Buck's case and the other cases in which the Attorney General remedied equal protection violations. However, the Director's Response contained factual and legal misrepresentations, and a material factual omission: The Attorney General affirmatively misrepresented the John Alba case, and it entirely omitted any mention of the Carl Blue case.

The Attorney General argued that: "This case ... presents a significantly different scenario than that presented in Saldano, where the prosecutor proffered the offending testimony.... Unlike Saldano, ***Alba***, Broxton, and Garcia, in Buck's case Quijano was called by the defense, not the State." Thaler's Reply to Buck's Motion for Relief from Judgment and Motion for Stay of Execution at 15, 17 (Docket Entry No. 30) (emphasis supplied). This assertion was materially false. Like Mr. Buck's case, the ***defense*** called and sponsored Quijano's testimony in *Alba*. Despite this supposedly distinguishing fact, the Attorney General acknowledged in Alba's case that Alba's sentence had been obtained in violation of equal protection because of the government's reliance on race.

Likewise, the defense called and sponsored the testimony of Quijano in *Blue* — ***a case left completely unmentioned by the Attorney General in the Director's Response and in every pleading he had filed in this case***.

Moreover, unlike in Mr. Buck's case, the government did ***not*** explicitly elicit any causal link between Blue's being an African-American and the likelihood of his committing violence in the future. Despite this, the Attorney General acknowledged that Blue's sentence was obtained in violation of equal protection because of the government's reliance on race as evidence of dangerousness.

The district court denied Mr. Buck's motion. In its order denying relief from judgment, the district court held that Mr. Buck was not entitled to prevail under Fed. R. Civ. P. 60(b)(6) because of the amount of time that had elapsed between the judgment and Mr. Buck's motion. *See* App. 3 at 7. It also declined to reopen the judgment based on fraud on the court. In reaching its conclusion, the court relied on the Fifth Circuit's previous denial of COA and the Attorney General's representation that "Quijano did not suggest to the jury that race or ethnicity should be a factor in the jury's decision." *Id*. The district court again denied a certificate of appealability to allow Mr. Buck to appeal the adverse decision. *Id*. at 9.

Mr. Buck sought an application for certificate of appealability in the court of appeals to review the district court's judgment that his habeas corpus proceeding should not be reopened. The Attorney General The Attorney General argued that Mr. Buck's case did not present extraordinary circumstances justifying reopening because (1) Mr. Buck's case is not like Saldaño's case; (2) it is not unconstitutional for the government to use a person's race as evidence to prove that he is dangerous; and (3) Mr. Buck conceded that his claims were procedurally defaulted.

The Fifth Circuit denied COA. With respect to the denial of his motion to reopen,[16] the Fifth Circuit held that it had "no doubts" that reasonable jurists could not debate whether the district court's refusal to grant relief under Fed. R. Civ. P. 60(b)(6) was error. The Fifth Circuit held that jurists could not with reason debate whether the motion was brought in a reasonable time because it was not filed until five years after the district court's entry of final judgment and a year after this Court denied certiorari. App. 1 at 10-11. The court additionally held that it would be unreasonable for any jurist to believe that Mr. Buck's case presented extraordinary circumstances. App. 1 at 11-12. The court's analysis of whether extraordinary circumstances were presented was limited to whether Mr. Buck could have raised equal protection and due process claims during his initial state habeas application and wholly ignored the circumstances Mr. Buck actually presented as being extraordinary. In other words, it did not consider the actual issue presented: whether Texas's arbitrary and disparate treatment of Mr. Buck in relation to the

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[16] The Fifth Circuit also held that Mr. Buck's request for a COA on his underlying constitutional claim constituted a successive habeas petition. *See* Opinion at 5-7. However, Mr. Buck did not seek a COA on the district court's decision on his underlying equal protection and due process claims. To be entitled to a COA, even on a claim disposed on a procedural ground, Mr. Buck has to make a substantial showing of the denial of a constitutional right. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 US 473,484 (2000). Hence, the Fifth Circuit merely confused Mr. Buck's attempt to make this showing in connection with the denial of his motion to reopen the judgment as a request for a COA on the underlying claim.

seven other cases in which Texas confessed error and its misrepresentations and omissions to federal tribunals of highly material information were extraordinary circumstances.

With respect to the district court's denial of the motion on fraud grounds, the Fifth Circuit held that jurists could not reasonably debate the district court's conclusion that the Attorney General's persistent and misleading material misrepresentations to multiple federal tribunals in multiple pleadings was not a fraud on the court. App. 1 at 12-14.

REASONS FOR GRANTING THE WRIT

I. MR. BUCK'S DEATH SENTENCE WAS OBTAINED IN VIOLATION OF EQUAL PROTECTION, DUE PROCESS, AND THE EIGHTH AMENDMENT.

> *"If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."* – Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)

A. Racial Discrimination Has No Place in the Courtroom.

The Attorney General of Texas has previously explained to this Court why the government cannot, consistent with the United States Constitution, rely on the defendant's race as a basis for asking a jury to sentence him or her to death:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 442 U.S. 545, 555 (1979). A defendant is "entitled to have his punishment assessed by a jury based upon consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he share[s] a

> characteristic. *Guerra v. Collins*, 916 F.Supp. 620, 630 (S.D. Tex. 1995), *aff'd*, 90 F.3d 1075 (CA5 1996).

App. 6 at 7-8. Where "the infusion of race as a factor for the jury to weigh in making its [sentencing] determination" has occurred, "[i]t is appropriate for the Court to grant certiorari, vacate the judgment below, and remand the case (GVR) when such resolution is supported by the equities of the case." *Id.* at 8 (citing *Lawrence v. Charter*, 516 U.S. 163, 167-68 (1996)). This Court unanimously agreed with the Attorney General and granted relief. *Saldaño v. Texas*, 530 U.S. 1212 (2000).

In *Rose*, *supra*, a case analogized to the instant circumstances by the Attorney General in *Saldaño*, this Court considered whether to adopt a harmless error analysis for claims of grand jury discrimination on federal habeas review. Justice Blackmun, writing for the majority, acknowledged the costs associated with the mandatory reversal approach, but he believed that "such costs as do exist are outweighed by the strong policy the Court has consistently recognized of combating racial discrimination in the administration of justice." *Id.* at 558. Justice Blackmun recognized that racial discrimination is "especially pernicious in the administration of justice," because it "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Id.* at 555-56.

Justice Blackmun reaffirmed the Supreme Court's traditional doctrine of automatic reversal where race has infected the proceeding:

> We think the better view is to leave open the route that over time has been the main one by which Fourteenth Amendment rights in the

> context of grand jury discrimination have been vindicated. For we also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. We therefore decline to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice, and we adhere to our position that discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction.

Id. at 558-59 (citation and quotation marks omitted). *See also United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996) ("[A] discriminatory jury selection process "offends the Constitution and calls into question the integrity of our judicial system. ... [O]nly by repudiating all results from such a trial can public confidence in the integrity of this system be preserved, even when it means reversing the conviction of the very defendant who exercised the discriminatory challenges."); *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (noting that the Fourteenth Amendment "makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution").

"The willingness of the courts to tolerate racial discrimination in order to carry out the death penalty has a corrupting effect not just on capital cases, but throughout the criminal justice system." Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 475 (1995). *See also State v. Slappy*, 522 So.2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219 (1988) (observing that "the appearance of discrimination in court procedure is especially reprehensible, since it is the

complete antithesis of the court's reason for being – to insure equality of treatment and evenhanded justice"). In short, "[r]acial discrimination has no place in the courtroom. *Edmonson*, 500 U.S. at 630.

B. Mr. Buck's Case Is Indistinguishable From Other Quijano Cases in Which the Attorney General Confessed Error and in Which Federal Courts Found Constitutional Violations.

In capital sentencing proceedings in Texas, the state has the burden to prove beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. Art. 37.071 § 2(b)(1) & (c).

During Mr. Buck's capital trial, Dr. Quijano was called by the defense at sentencing and testified that he did not believe Mr. Buck would be a future danger. While on direct review he told the jury that racial minorities were overrepresented in the criminal justice system, he did not tell the jury that Mr. Buck's being black meant that his likelihood of being dangerousness in the future was higher than if he were white. On cross-examination, the government, through a leading question, elicited testimony from Dr. Quijano that people are more likely to commit acts of violence if they are black.

> Q: You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that ***the race factor, black increases the future dangerousness for various complicated reasons; is that correct?***
>
> A: Yes.

28 RR 160. During its closing argument, the government urged the jury to rely on Dr. Quijano's testimony to find that Mr. Buck would constitute a future danger. 28 RR 260 ("You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence."). The jury found that Mr. Buck would be a future danger, and he was sentenced to death.

The relevant constitutional inquiry with respect to whether Mr. Buck's right to equal protection was violated involves an analysis of the ***government's*** conduct. *See Edmonson*, 500 U.S. at 619 ("Racial discrimination, though invidious in all contexts, violates the Constitution ... when it may be attributed to state action."). In Mr. Buck's case, the ***government*** specifically elicited from Quijano that "the race factor, [being] black, increases the future dangerousness." 28 RR 160. It is highly relevant, and egregious, that those precise words actually ***came out of the prosecutor's mouth*** in the form of a leading question to Dr. Quijano. Prior to that, Quijano's only reference to race came when he testified to the factual assertion that minorities are overrepresented in the criminal justice system. 28 RR 111. The Attorney General acknowledged that Quijano's direct examination testimony ***did not attribute a causal link between being black and having an increased likelihood of future dangerousness***. Thaler's Reply to Buck's Motion for Relief from Judgment and Motion for Stay of Execution at 15-16 ("In this case, first on direct examination by the defense, Dr. Quijano merely identified race as one statistical factor and pointed out that African-Americans were overrepresented in

the criminal justice system; he did not state a causal relationship, nor did he link this statistic to Buck as an individual.").

Instead, it was the ***government*** that elicited the "causal relationship" testimony from Quijano on cross-examination. In closing argument, the ***government*** urged the jury to rely on Quijano's testimony as evidence that Mr. Buck would be dangerous in the future: "You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence." 28 RR 260. When the defense objected on the ground that the prosecution misrepresented Quijano's testimony, the trial court ***did not*** sustain the objection, telling the jurors that they had heard the evidence and they were the fact finders. *Id*. at 261. The prosecution immediately continued:

> I'm only telling you what I heard. I gave him every opportunity to explain it, to be honest with you, and I thought what he said was that he was at the low range but the probability did exist that he would be a continuing threat to society. You can go back there and discuss what you heard but I would submit to you that's what the man said. ***He's an expert in the field.***

Id. (emphasis supplied); *see Saldaño v. Cockrell,* 267 F. Supp. 2d 635, 641 (E.D. Tex. 2003) ("The court finds that the admission of the previously mentioned portions of Quijano's testimony and the District Attorney's reference to that testimony during closing argument constituted constitutional error because the testimony and argument invited the jury to determine whether Saldaño would receive the death penalty based in part upon his race and ethnicity.").

Other cases in which the Attorney General conceded constitutional error are materially indistinguishable. In *Blue*, the defendant called Quijano to testify that the defendant would not be a future danger. On cross-examination, the government did not intentionally elicit testimony specifically about race, nor did it elicit evidence of any causal link between that particular defendant's race and its purported negative effect on future dangerousness. Indeed, unlike Mr. Buck's prosecutor, the prosecutor in *Blue* tried to expressly disclaim that race had predictive value after Quijano volunteered it as a factor:

> Q. And do we have a series of factors then that help us in predictions of future dangerousness?
>
> A. There are three groups of factors that I consider when asked about dangerousness, and this is derived from literature as well as from my own personal work. The first cluster is what is called a statistical factor.
>
> * * * *
>
> Q. And what statistical factors are important?
>
> * * * *
>
> A. Gender or sex, male being more violent than female.
>
> Q. Okay.
>
> A. Race, statistically.
>
> Q. Okay. ***This is just taking a hard look at the numbers in the past, is that correct?***
>
> A. These are, yeah, the race is just looking at the number—the racial breakdown in the prison system.
>
> Q. Okay.
>
> A. And in that, the minorities are over represented.
>
> Q. Okay.
>
> A. Now, ***race is then neutralized*** by the next factor, which is education.

19 RR 291-92, *State v. Blue*, No. 23,293-272 (emphases supplied). In short, the government relied ***less*** on race as a basis for obtaining an affirmative answer on the future dangerousness special issue in *Blue* than in Mr. Buck's case. In *Blue*, the Attorney General confessed constitutional error to the district court, the federal district determined that there was a constitutional violation, and Mr. Blue received a new sentencing trial free from all consideration of his race.

In *Alba*, the defense also called Quijano to testify. As in Mr. Buck's case, the government consciously elicited testimony about race in the form of leading questions to Quijano on cross-examination:

> Q. Now, I want to talk a little bit about statistical factors, and how they kind of play into all this. Those are things -- those statistical factors are those things that they're kind of in black and white. I mean, a person is this age, and he can't be any other age; he's either Hispanic or he's not, he's either black or he's not; or he's white or he's not; or he's a male -- those kinds of things. Race, according to at least one study cited in your paper, has some bearing on this. Correct?
>
> A. Yes.
>
> Q. And Hispanics have a higher recidivism rate than -- well, first of all, let me back up.
>
> Men have a higher recidivism rate than women.
>
> A. Very true.
>
> Q. And then Hispanic men have a higher recidivism rate than blacks or whites.
>
> A. Yes. That is true.

27 RR 531-32, *State v. Alba*, No. 219-81215-91 (Exhibit 13). The government's questions in *Alba* were not as explicit about the causal relationship between race and future dangerousness as they were in Mr. Buck's case. Nevertheless, the Fifth

Circuit determined a constitutional violation occurred. *Alba v. Johnson*, 232 F.3d 208, 2000 WL 1272983, No. 00-40194 (5th Cir. Aug. 21, 2000) (unpublished) (Appendix 12).[17]

II. EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS.

Exceptional circumstances warrant this Court's intervention. When Attorney General Cornyn identified Mr. Buck's and five other cases as having been obtained in violation of the United States Constitution and promised to remedy them, he thought it important to assure Texas residents that, not only had his office reviewed the cases of all the inmates then on death row in which Quijano had testified, his office had also reviewed the cases of all the inmates who had been executed in the

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[17] Examination of a case that Attorney General Cornyn identified as being ***dissimilar*** to *Saldaño* is insightful and belies the current Attorney General's assertion that Cornyn's review was careless. In the case of Anthony Graves (who has since been exonerated), the defense had called Quijano to testify, and Quijano testified on direct examination that the "ethnic background" of a person was relevant to an assessment of his dangerousness. The government, however, did not ask any questions about race or ethnic background in its cross-examination of Quijano, instead focusing on Quijano's failure to conduct forensic testing and cursory record review. *See* 43 RR 4427-40. And, unlike in Mr. Buck's case, the State ***undermined*** Quijano's testimony in its closing argument, rather than urging the jury to rely on it. 44 RR 4484-85 ("They brought a psychologist in to testify…He acknowledged that he administered no type of testing. Isn't that one of the key things of a clinical psychologist, to administer testing, a battery of tests, to tell you something about the person? He told us he thought that he had read the autopsy reports, but he didn't remember a whole lot about them….He called it situational violence, not random violence…[I]t doesn't make any difference, they're just as dead either way."). In short, the government did not rely on the defendant's race as evidence of future dangerousness in Graves, and that is why then-Attorney General Cornyn found that Mr. Buck's death sentence should be overturned and Graves's should not.

modern era. "In addition, my office has reviewed case files for all executions in Texas since 1982 and we have not found any cases in which a defendant was executed on the basis of this kind of testimony by Dr. Quijano."[18] Now, just eleven years later, Texas is poised to execute an individual on the basis of this testimony. And not just any individual, but an individual who Texas's highest legal officer specifically identified as having been sentenced in violation of equal protection.

Of the seven individuals whose death sentences the Attorney General had identified as having been obtained in violation of equal protection, Mr. Buck is the only one who has not been resentenced at a trial free from consideration of his race as a basis for imposing death. The only change that has taken place since the Attorney General identified Mr. Buck's case as being similar to the *Saldaño* case is that a different person now holds the position of Attorney General. That is an insufficient legal basis on which to treat Mr. Buck differently from the six other cases that the former Attorney General had identified as being similar. Capriciousness in the administration of the death penalty is intolerable. Mr. Buck has been twice-subjected to equal protection violations, once when the government asked the jury to sentence him to death, and a second time when the government arbitrarily treated him differently from similarly situated defendants.

Texas promised to remedy Mr. Buck's racially-based death sentence, then reneged on that promise, then hid its promise from the federal courts to avoid its

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[18] App. 7.

enforcement in Mr. Buck's case. Mr. Buck is now the only one of the seven individuals whose death sentences were tainted by the government's reliance on race who is without a remedy. Such caprice is intolerable in the administration of justice.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Buck's petition for writ of habeas corpus.

Respectfully submitted,

s/ Gregory W. Wiercioch

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